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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CLIFFORD ALEXANDER, *et al.*,

Appellants,

v.

WILLIAM M. DALEY, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF AMICUS CURIAE FOR THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES IN SUPPORT OF APPELLANTS

JONATHAN L. ABRAM*
STEVEN J. ROUTH
ADAM K. LEVIN
JEFFREY D. PARISER
KEVIN S. HUFFMAN
ROBERT M. BLUE
KAMIL ISMAIL
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600
Counsel for Amicus Curiae

* Counsel of Record

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BRIEF AMICUS CURIAE FOR THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy.[1] The League is organized in more than a

[1] This brief is filed with consent of the parties, and copies of the consent letters have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. Sup. Ct. R. 37.6.

thousand communities in every state and has more than 125,000 members and supporters nationwide. The League was organized in 1919 as an outgrowth of the 72-year struggle to win voting rights for women in the United States.

As part of its support for District of Columbia self-government since 1938, the League has been instrumental in securing the following for District citizens: the right to vote for President and Vice-President; the right to elect a nonvoting delegate to Congress in 1970; and the limited home-rule charter providing for an elected mayor and city council adopted in 1973. The League specifically has advocated full voting representation for District citizens since 1982.

The League thus has a strong and direct interest in this case. Protecting and enhancing voting rights for all Americans has been the primary goal of the organization since its inception. The League believes that full voting representation is a fundamental right that must be afforded all citizens to secure both the individual liberty of each and the legitimacy of the social order for all.

SUMMARY OF ARGUMENT

Representative democracy is the bedrock principle on which our nation was founded, and it is the principle that defines the relationship of all U.S. citizens to their government – with the notable exception of the 600,000 citizens who reside in the District of Columbia. District citizens, alone among Americans otherwise qualified to vote, are denied the right to elect a voting member to represent their views in the U.S. Congress. The League is aware of no other situation where qualified U.S. citizens are denied the right to vote based on where they live.

This unique anomaly, preserved by a 2-1 vote in the District Court below, is inconsistent with both our country's foundational documents and this Court's long-

standing jurisprudence recognizing the primacy of the right to vote. The decision below cannot be squared with the Declaration of Independence, which teaches that our government's "just powers" are derived from the "consent of the governed." DECLARATION OF INDEPENDENCE, para. 2, cl. 2. It also ignores the Preamble to the Constitution, which begins "We the people," U.S. CONST. pmbl., and proclaims that it was "the people" who "ordain[ed] and establish[ed]" our constitutional system. *Id.*

As detailed below, the bedrock principle at the heart of the American system of government – that a "just" government derives its power through meaningful participation of its citizens, *i.e.*, "the consent of the governed" – is deeply embodied in our country's foundational documents. Because the District Court's crabbed reading of the Constitution conflicts with those documents and the intent of the Framers, it must be reviewed and reversed by this Court. *See* Point I, *infra*.

This Court's decisions have been critical to the implementation of the Framers' vision of a representative democracy. The Court repeatedly has protected the right to vote, requiring, for example, that congressional districts be apportioned so that each citizen can participate on equal terms with her neighbors. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964) (enunciating "one person one vote" standard). It similarly has rejected efforts to make voting more difficult for certain members of society, *e.g.*, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional), or, most recently, to disqualify certain representatives based on prior service in Congress. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). The District Court erred by ignoring those precedents. *See* Point II, *infra*.

This Court also has rejected efforts to exclude from full participation in our democracy certain citizens because of where they live. *See, e.g., Evans v.*

Cornman, 398 U.S. 419 (1970) (holding unconstitutional Maryland law that denied the right to vote in state elections to residents of the federal enclave at the National Institutes of Health). This Court granted review in *Evans* even though only a small number of persons' voting rights were at stake, because it recognized that the vote serves as the essential "link" between a citizen and "his laws and government" and, in that way, "is protective of all fundamental rights and privileges." *Id.* at 422 (citations omitted). It should do the same here. *See* Point III, *infra*.

The ruling below is a direct challenge to the foundational principle repeatedly affirmed by this Court. In its decision, the District Court majority determined that it was precluded from addressing the inequity inherent in denying plaintiffs the right to select a voting representative by "longstanding judicial precedent, as well as the Constitution's text and history." App. at 71a. Amicus submits that nothing mandates the result below, and that in fact the only way to harmonize the text of the Constitution, its history, and this Court's precedents is to hold that citizens who reside in the District, like United States citizens who live elsewhere, have the right to elect voting representatives to Congress in proportion to their number. *See* Point IV, *infra*.

At the very least, the question of whether U.S. citizens who reside in the District are entitled to voting representation in Congress is an important one that deserves an answer from this Court. Not only have significant voting rights issues traditionally been resolved by this Court, but this Court stands as the appropriate arbiter of issues relating to the basic structure and operation of our constitutional system. Whether that system will continue effectively to disenfranchise over half a million citizens because they reside in the District and to operate so contrary to the bedrock principle on which it rests is an issue this Court should decide.

ARGUMENT

I. THE DECISION BELOW CANNOT BE SQUARED WITH THE FRAMERS' INTENT THAT ALL CITIZENS HAVE VOTING REPRESENTATION IN THE FEDERAL GOVERNMENT.

The district court's decision relied heavily on Article I, § 2, cl. 1 of the Constitution, which provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the Several *States*." U.S. CONST., art. I, § 2, cl. 1 (emphasis added). *See* App. at 17-58a. In relying on the Framers' use of the word "States" to deny District residents the right to a voting representative, however, the District Court failed to take adequate account of the great weight of the evidence, both historical and textual, which requires a different result.

It cannot seriously be disputed that the Framers viewed the right to elect representatives as an essential, if not the critical, component of the republican form of government. Thus, James Madison wrote in *The Federalist* No. 52 that "the right of suffrage is very justly regarded as a fundamental article of republican government." *The Federalist* No. 52, at 326 (Clinton Rossiter ed., 1961); *see also The Federalist* No. 9, at 72-73 (A. Hamilton) (stating that "the representation of the people in the legislature by deputies of their own election" is an essential quality of our system of government). Moreover, the Framers viewed a representative's ties to his or her particular constituents as being of great importance in preserving the right of the people to consent to the rule of those who governed them. Madison explained that "it is essential to liberty that the government in general should have a common interest with the people [and that Congress] should have an immediate dependence on, and an intimate sympathy with, the people." *The Federalist* No. 52, at 327; *see also The Federalist* No. 35, at 216 (A. Hamilton) ("This

dependence, and the necessity of being bound himself, and his posterity, by the laws to which he gives his assent, are the true, and they are the strong chords of sympathy between the representative and the constituent."); *The Federalist* No. 56, at 346 ("It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents.").

Significantly, the Framers viewed the right to participate in the government through the election of voting representatives as the "full answer" to concerns that a national government would be so powerful as to invite abuse and tyranny:

> [I]t is a full answer . . . to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, only efficacious security for the rights and privileges of the people, which is attainable in civil society.

The Federalist No. 28, at 180 (A. Hamilton) (footnote omitted).

Finally, the Framers intended that these rights and protections be enjoyed by *all* of the people. Madison criticized the British House of Commons, in which "so great a proportion of the members are elected by so small a proportion of the people;" in contrast, the Framers envisioned a republic in which the representatives would be "elected FREELY by the WHOLE BODY of the people." *The Federalist* No. 41, at 259-60 (J. Madison); *see The Federalist* No. 57, at 351 ("Who are to be the electors of the federal representatives? . . . *The electors are to be the great body of the people of the United States.*") (emphasis added). Accordingly, from a perspective barely three decades removed from the constitutional debates, this Court recognized that the United States government "is emphatically, and truly, a government of the people. In

form and in substance it emanates from them. Its powers are created by them, and are to be exercised directly on them, and for their benefit." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819).

More recently, the Court wrote of the Constitutional Convention that "[o]ne principle was uppermost in the minds of many delegates: that, *no matter where he lived,* each voter should have a voice equal to that of every other in electing members of Congress." *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964) (emphasis added). This principle is squarely reflected in the text of the Constitution itself: Article I, section 2, clause 1 provides for election of members of the House of Representatives by "*the People* of the several States." U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

The District Court ignored these principles by limiting the right to vote to those who reside in "States" as opposed to the District of Columbia. Even if the entire text and focus of the Constitution were to be ignored in favor of an undue focus on the word "States" (as opposed to "People") in Article I, Section 2, Clause 1, the District Court recognized that the word "States" in the Constitution itself has been given different meanings depending on the applicable context. App. at 17-19a. The District Court specifically noted that "the Supreme Court has on occasion interpreted the constitutional term 'state' to include the District." *Id.* at 19a. (citing *Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (holding that references in the Full Faith and Credit Clause to "each State" and "every other State" include the District of Columbia)); *see Callan v. Wilson*, 127 U.S. 540, 550 (1888) (holding that right to trial by jury extends to residents of the District).

This Court's interpretations of numerous other provisions in the Constitution referencing the "States" have likewise read the word to include the District. *See, e.g., District of Columbia v. Carter*, 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a

'State or Territory' within the meaning of any particular . . . constitutional provision depends upon the character and aim of the specific provision involved."); *Loughborough v. Blake*, 18 U.S. 317, 320-22 (1820) (refusing to exclude the District from the apportionment of direct taxes despite the "several States" language of Article I).

The Court below gave no meaningful guidance to distinguish when the District should be appropriately treated as a State for constitutional purposes and when it should not, and yet it rested its decision on that distinction. Therefore, it is critical for this Court to square its own precedents – and the clear intent of the Framers – with the decision of the lower court, in an effort to underscore the importance of the franchise to *all* American citizens resident in the federal system.

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S RECOGNITION OF THE IMPORTANCE OF THE RIGHT TO VOTE TO THE PROPER FUNCTIONING OF OUR FEDERAL SYSTEM.

In light of the fundamental nature of the right at issue, the impact of this case extends far beyond the borders of the District of Columbia and warrants review. As Judge Oberdorfer noted in his dissent below, "[t]he importance of voting by the people in a representative democracy, such as the Constitution established, is so obvious that it is difficult to articulate its provenance." App. at 125a. Given the obvious importance of suffrage in a republican form of government, it is not surprising that "[i]n decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

Indeed, for more than a century, this Court's decisions have repeatedly and consistently affirmed that the right

of suffrage is a bedrock principle of our democracy. *See Ex parte Yarbrough*, 110 U.S. 651, 664 (1884) ("[T]he right of suffrage was considered to be of supreme importance to the national government."); *Twining v. State of New Jersey*, 211 U.S. 78, 106 (1908) ("[I]t must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will."), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964).

As the Court has explained, voting rights are of primary importance because every other civil right depends upon the right to vote:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry, 376 U.S. at 17-18. *See also Plyler v. Doe*, 457 U.S. 202, 233 (1982) ("[A] citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process.") (Blackmun, J., concurring); *Reynolds*, 377 U.S. at 562 ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting is . . . a fundamental political right, because [it is] preservative of all rights.").

The Court thus has consistently reviewed voting rights decisions in order to recognize the validity of laws promoting voting rights while striking down those that unconstitutionally restrict suffrage. For example, in *Ex parte Siebold*, 100 U.S. 371 (1879), the Court affirmed Congress' power to enact statutes that protect the right

to vote by punishing unlawful interference with elections, noting that "[t]he due and fair election of . . . representatives is of vital importance to the United States." *Id.* at 388. In *Nixon v. Herndon*, 273 U.S. 536 (1927), and *Smith v. Allwright*, 321 U.S. 649 (1944), the Court invalidated "white primary" rules which excluded African-Americans from participating in primary elections. Likewise, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court declared unconstitutional racially-based gerrymandering.

The Court's apportionment cases also have expressed eloquently the enduring importance of the right to vote in a free society:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

Reynolds, 377 U.S. at 555; *see id.* at 562 ("[T]he right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.").

In addition, the Court's more recent jurisprudence has continued to recognize that the right to vote is the foundation upon which our democracy rests. For example, in striking down a signature requirement for independent candidates seeking access to the ballot in Chicago, the Court wrote that "for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (citations omitted). Similarly, in upholding a Tennessee statute regulating the display or distribution of voting materials at polling places, the Court explained that the right to vote is "a right at the heart of our democracy." *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

In light of such decisions, this case presents a compelling instance in which this Court is called upon to reaffirm the fundamental importance of access to the ballot. To "achieve any meaningful degree of individual political equality," *Plyler*, 457 U.S. at 233 (Blackmun, J., concurring), the citizens who live in the District must be able to participate fully in choosing their elected representatives.

III. THIS COURT REGULARLY HAS REVIEWED CASES IN WHICH PERSONS HAVE BEEN DENIED THE VOTE, BECAUSE OF THE FUNDAMENTAL SIGNIFICANCE OF VOTING RIGHTS IN DEMOCRATIC SOCIETY.

This Court has recognized the fundamental significance of the right to vote and has granted review in numerous cases involving significantly fewer citizens than are presented here. The current case involves the complete disenfranchisement of hundreds of thousands of U.S. citizens in the Nation's capital. Yet the Court consistently has reviewed cases affecting much smaller numbers of citizens and less significant offices, in light of the importance of protecting the franchise in all circumstances and for all citizens. Moreover, the Court frequently has reviewed the effect of state residency requirements on the right to vote. Therefore, the Court should decide the question of fundamental significance presented in this case, as it has decided numerous voting rights claims involving fewer citizens and lesser stakes.

In *Evans v. Cornman*, 398 U.S. at 419, the Court reviewed a Maryland statute that denied the right to vote in state elections to the residents of the National Institutes of Health ("NIH"), a federal enclave located in Montgomery County, Maryland. Though only a small number of people were affected, the Court granted review and invalidated the state statute. The Court explained that NIH residents had the right to vote in Maryland state elections, because, *inter alia*, "the right to vote, as the citizen's link to his laws and government,

is protective of all fundamental rights and privileges." *Id.* at 422 (citing *Yick Wo*, 118 U.S. at 370; *Wesberry*, 376 U.S. at 17).[2]

This Court has examined voting procedures affecting small numbers of citizens in other contexts as well. For example, in reviewing preclearance of district boundaries under the Voting Rights Act, the Court affirmed claims of voting discrimination when Pleasant Grove, Alabama (with a population of approximately 7,000) proposed to annex two parcels of land – one vacant, and one inhabited solely by a single extended family – but not another parcel inhabited by black residents. *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987). *See also City of Lockhart v. United States*, 460 U.S. 125 (1983) (denying approval to election plan for city council of Lockhart, Texas, a

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[2] Significantly, federal authority over the District of Columbia and federal enclaves is grounded in the same provision in the Constitution. *See* U.S. CONST. art. 1 § 8 cl. 17 (providing for Congress's legislative jurisdiction over the District and "all Places purchased . . . for the erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"). The majority below distinguished *Evans* by contrasting Congress's delegation of authority over the NIH enclave to Maryland, and Maryland's exercise of that authority, with Congress's authority over the District. A mere decision by Congress or a state to exercise legislative authority, however, cannot operate to deprive a class of individuals of a fundamental right, or deny them equal protection of the laws, unless it survives strict scrutiny. *See, e.g., Evans*, 398 U.S. at 422 ("[T]here can be no doubt . . . that 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'") (quoting *Harper*, 383 U.S. at 665); *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933) ("[T]he District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution. . . . We think it not reasonable to assume that the cession stripped them of these rights."). There admittedly is no "compelling justification for denying District residents the right to vote in Congress." App. at 59a.

community of less than 8,000 people); *City of Rome v. United States*, 446 U.S. 156 (1980) (affirming denial of preclearance when Rome, Georgia sought to annex 13 parcels of land, 9 of which were vacant).

In fact, the Court has made clear the need to subject infringements of voting rights to "close and exacting examination," noting that "[s]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, *any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.*'" *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (quoting *Reynolds*, 377 U.S. at 562) (emphasis added). In *Kramer*, for instance, the Court overturned a New York law restricting voting on certain school district offices to landowners and parents of public school children, even though the restrictions applied only to school board elections in districts holding annual school board meetings. *Kramer*, 395 U.S. at 623.

Moreover, even when voting limitations are applied only to single state or local offices, this Court has reviewed the challenges because of the fundamental importance of the right to vote. Last Term in *Rice v. Cayetano*, 120 S. Ct. 1044 (2000), the Court reviewed and struck down a Hawaii law restricting the class of people who could vote for the trustees of the Office of Hawaiian Affairs, a state agency administering programs for descendants of the early inhabitants of the Hawaiian islands. The Court noted the constitutional significance of protecting the rights of all citizens at "the most basic level of the democratic process, the exercise of the voting franchise." *Id.* at 1053-54. Similarly, in *Ball v. James*, 451 U.S. 355 (1981), the Court upheld an Arizona statute allowing only certain landowners to vote for the directors of a water reclamation district. The plaintiffs there were the very limited class of registered voters within the geographic boundaries of the water reclamation district who owned less than one acre of

land and were thus excluded from voting under the statute. *Id.* at 360. And in an electoral scheme involving even fewer people, this Court upheld claims that a local statutory formula for election of junior college district trustees resulted in the dilution of the votes of residents of a few larger school districts. *See Hadley v. The Junior College Dist. of Metro. Kansas City, Missouri*, 397 U.S. 50 (1970). *See also Hill v. Stone*, 421 U.S. 289 (1975) (overturning state and city laws limiting the right to vote in Fort Worth, Texas bond issue elections to citizens who had rendered property for taxation); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (overturning a Louisiana law allowing only property taxpayers to vote in elections to approve the issuance of revenue bonds by the municipal utility system).

This Court also has reviewed state residency requirements to determine if they unlawfully exclude citizens from the franchise. In *Dunn*, 405 U.S. at 330, the Court sustained a challenge to Tennessee's residency laws which required voters to live in the state for a full year before voting. The Court found it significant that "[d]urational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of 'a fundamental political right, . . . preservative of all rights.'" *Id.* at 335-36 (quoting *Reynolds*, 377 U.S. at 562). Similarly, the Court overturned a state law restricting military personnel who moved to Texas from voting in Texas elections as long as they remained active members of the armed forces. *Carrington v. Rash*, 380 U.S. 89 (1965). The *Carrington* Court found that the law impinged on "matters close to the core of our constitutional system." *Id.* at 96. *See also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (reviewing and ultimately denying claims of a small unincorporated community in Tuscaloosa, Alabama, which argued that it should be allowed to vote in the Tuscaloosa local

elections while subject to certain city jurisdiction); *Burns v. Fortson*, 410 U.S. 686 (1973) (upholding Georgia statute requiring registrars to close voter registration books 50 days before general elections).

The Court's regular review of claims of disenfranchisement, even when they involve relatively few citizens and lesser local offices, reflects the central place of voting in our constitutional democracy. The claims presented here challenge the complete exclusion of hundreds of thousands of American citizens from any form of voting representation in the U.S. Congress. The exclusion of those citizens merely because they reside in the Nation's capital from participation in our federal system should not rest on the vote of a single district court judge. Accordingly, this Court should grant review of the decision below.

IV. THIS COURT'S PLENARY REVIEW OF THE ACTION IS ESSENTIAL.

Plenary review of the trial court's decision is also appropriate because no other forum exists for a meaningful consideration of the fundamental issues in dispute. This Court alone has the institutional authority to address the profound legal questions that divided the panel below and to resolve the constitutional issues that have evaded a political solution for more than 120 years.

A. The Court Should Grant Plenary Review Because The Appeal Presents Profound Legal Issues That Must Be Resolved.

This Court has never before been asked squarely to decide whether United States citizens resident in the Nation's capital are entitled to voting representation in the United States Congress.[3] That issue is clearly an

[3] In *Loughborough*, 18 U.S. at 317, the Court held that Congress's general power of taxation was broad enough to cover a direct tax on the District of Columbia. The Court concluded that this power was not limited by the "want of a representative [from the District] in Congress," but also acknowledged that "it might be

"important question of federal law that has not been, but should be, settled by this Court," and is therefore deserving of plenary appellate review. Sup. Ct. R. 10(c). Indeed, the difficulty and importance of the question is underscored by the profound division of the three-judge court below.[4] The Court thus should require full briefing and oral argument on the merits of this grave and substantial question – not only for the unique constitutional enigma it poses, not only to reaffirm the rights of disenfranchised citizens most subject to congressional control, but also, most critically, for the integrity of the Nation's system of governance.

Because it involves the fundamental voting rights of hundreds of thousands of citizens, freely exercised for a decade but later denied by Congressional action, this case is peculiarly within this Court's purview. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167-75 (1803) ("The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."). This is especially true because the dispute as to the meaning of Article I conflicts with the affirmative mandates of the Bill of Rights and implicates opposing constitutional considerations.

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more congenial to the spirit of our institutions to admit a representative from the district." *Id.* at 324-25. *See also Heald v. District of Columbia*, 259 U.S. 114 (1922) (upholding Congressional taxing authority despite lack of political representation). In a case involving a challenge by a losing candidate for U.S. Senator from Maryland, the Court summarily affirmed a *per curiam* judgment that District of Columbia residents were not entitled to vote in elections in Maryland. *See Albaugh v. Tawes*, 233 F. Supp. 576 (D. Md.), *aff'd mem*, 379 U.S. 27 (1964).

[4] While the panel below agreed that the plaintiffs' "grievances are serious," App. at 2a, the majority interpreted "longstanding judicial precedent as well as the Constitution's text and history" to preclude the panel's authority to grant relief. *Id.* at 71a. In dissent, Judge Oberdorfer harmonized the Constitutional text and history with this Court's unflinching mandate in favor of fundamental voting rights, and saw no bar to relief. *Id.* at 75-145a.

Moreover, while the judgment below rested in part on what the District Court perceived as binding statements of this Court, *see* App. at 71a, not all of those pronouncements were entitled to the precedential weight they were accorded. In fact, many of the cases cited by the majority below included no more than *dicta* and legal fictions.[5]

If U.S. citizens – simply because they reside in the Nation's capital – are to be denied voting representation in the People's house of the national legislature, they have a right to more than *dicta* and legal fictions from a 2-1 majority in the trial court. They have a right to a foursquare ruling from their Supreme Court.

B. The Court Should Grant Plenary Review Because It Alone Can Decide Fundamental Questions That The Political System Has Been Unable To Resolve.

The right to vote is ultimately a *constitutional* privilege not subject to the vagaries of political discourse, and the very nature of our political system creates strong disincentives to any change in the current, and unconstitutional, status quo. It is particularly vital, therefore, that this Court exercise its "province and duty . . . to say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177, by settling the legal debate as to whether the Constitution itself requires an extension of the franchise to the residents of the Nation's capital.

U.S. citizens residing in the District have struggled to achieve fair representation in the political process for more than 120 years, dating from congressional decisions in the 1870s that confined the "municipal

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[5] The majority relied heavily on *Loughborough*, 18 U.S. at 317 (in *dicta*, indulging in the legal fiction that the District "has voluntarily relinquished the right of representation"), *Albaugh*, 379 U.S. at 27 (a one-sentence affirmance of a three-page *per curiam* lower court opinion), and *Evans*, 398 U.S. at 421 (indulging in the fiction that a federal enclave remained part of the original state).

government . . . to mere administration." *Metropolitan R. Co. v. District of Columbia*, 132 U.S. 1, 7 (1889). *See* Act of June 11, 1878, 20 Stat. 102, ch. 180 (allowing a Board of Commissioners appointed by the President to assume control of most city functions, and removing the District's right to elect a non-voting delegate to the House of Representatives.) In subsequent years, Senate officials argued that "the District should participate in national affairs" through elected representation, S. Doc. No. 61-653, at 9 (1910), and the issue of statehood for the District was addressed in numerous hearings before the House and the Senate. *See* H.R. Rep. No. 102-909, at 9 (1992). But it was not until 1973 – nearly 100 years after the District's first City Council was displaced – that Congress even created a limited brand of "home rule" to enable District residents to elect their own mayor and city council without presidential oversight. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code Ann. §§ 1-201 to 1-299.7 (1981)). [6]

As a result, the legislative process has failed for more than a century to secure the fundamental right to vote in congressional elections for U.S. citizens who reside in the District. From 1878 until 1977, Congress rejected more than 150 proposals seeking voting representation for the District. *See* Orrin G. Hatch, *Should the Capital Vote in Congress? A Critical Analysis of the Proposed D.C. Representation Amendment*, 7 Fordham Urb. L.J. 479, 495 & n.69 (1979). Likewise, although seventy percent of Americans support congressional voting

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[6] The 1973 "home rule" legislation was passed only after Congress had defeated more than twenty-three similar proposals for District self-governance in prior years. *See* Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 Geo. L.J. 207, 256-57 & nn.171-77 (1957-58).

rights for the District, *see Metro In Brief: The District*, WASH. POST, Apr. 13, 2000, at B3, every recent proposal to guarantee full and equal voting rights to U.S. citizens living in the District has been rejected. *See, e.g.*, H.R. Rep. 102-909, at 9-12 (reciting a modern history of suffrage efforts in the District); 139 Cong. Rec. H10574-75 (Nov. 21, 1993) (reflecting the defeat of the New Columbia Admissions Act, which would have admitted portions of the District into the Union as the State of New Columbia).

Consequently, "the record shows that every means of granting the franchise to the citizens of the District of Columbia . . . has failed." H.R. Rep. 102-209, at 10 (quotation omitted). Ever since the creation of the Board of Commissioners in the 1870s, the political system has perpetuated a tradition of disenfranchisement for District residents. It is not an answer, therefore, to insist that a political forum will afford District residents the constitutional protections that they deserve. Rather, it is this Court's opportunity – and this Court's obligation – to do what the clearly divided court below did not: to resolve once and for all whether U.S. citizens residing in the District have a fundamental right to vote in congressional elections.

CONCLUSION

For all the foregoing reasons, this Court should note probable jurisdiction of the decision of the trial court.

Respectfully submitted,

JONATHAN L. ABRAM*
STEVEN J. ROUTH
ADAM K. LEVIN
JEFFREY D. PARISER
KEVIN S. HUFFMAN
ROBERT M. BLUE
KAMIL ISMAIL
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600
Counsel for Amicus Curiae

* Counsel of Record